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No. 92-5129

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JOHN L. SULLIVAN,
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Louisiana

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a nationwide membership of more than 5,000 lawyers and 25,000 affiliate members. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence, and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL is concerned with the protection of individual rights and the improvement of the criminal law, its practices, and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's Sixth Amendment right to trial by jury and Fourteenth Amendment right not to be found guilty except on proof beyond a reasonable doubt. NACDL is very concerned about any decision that would undermine or dilute these constitutional guarantees, as would the adoption of the position taken by the Respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers and criminal defendants throughout the nation that NACDL should offer its assistance to the Court. Both the Petitioner and the Respondent have consented to NACDL's participation as Amicus Curiae, and letters of consent have been filed with this Court.

STATEMENT OF THE CASE

Amicus adopts the Petitioner's Statement of the Case.

SUMMARY OF THE ARGUMENT

A. This case lies at the intersection of two fundamental rights guaranteed to a criminal defendant: the right, under the Due Process Clause of the Fourteenth Amendment, to go free unless the prosecution proves each element of the charged offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), and the right, under the Sixth Amendment as incorporated through the Fourteenth Amendment, to have a jury determine whether the prosecution has satisfied that burden, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Harmless error review of an erroneous reasonable doubt instruction inevitably violates the Sixth Amendment right to a jury trial because it requires appellate factfinding in place of factfinding by the jury.

B. This Court has never applied harmless error analysis when an instruction prevented the jury from finding every element of the offense beyond a reasonable doubt. The Court has declared repeatedly that the absence of a reasonable doubt instruction requires automatic reversal. No Justice has expressed a contrary view. Although the Court has addressed a *failure* to instruct on reasonable doubt, there is no reason to distinguish between the omission of a reasonable doubt instruction and an instruction that is erroneous under *Cage* v. *Louisiana*, 111 S. Ct. 328 (1990) (per curiam). Neither instruction requires the jury to hold the prosecution to the burden of proof that due process requires. Harmless error review of either instruction would require impermissible factfinding by the appellate court.

C. The Sixth Amendment right to a jury trial bars application of harmless error analysis to an erroneous reasonable doubt instruction. Two lines of cases—one requiring automatic reversal when the trial court directs a verdict for the prosecution, and the other permitting

harmless error analysis when the trial court instructs the jury on an improper burden-shifting presumption—confirm this point. Under those cases, an instruction that prevents the jury from considering whether each element of the offense has been proved beyond a reasonable doubt requires automatic reversal, because harmless error analysis would involve judicial factfinding in violation of the defendant's jury trial right.

D. *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), holding that a coerced confession is subject to harmless error analysis, does not suggest a contrary result. In *Fulminante*, the jury had found the defendant guilty beyond a reasonable doubt. Thus, the Court had no occasion to address the violation of the Sixth Amendment jury trial guarantee that occurs when an appellate court determines in the first instance whether the evidence establishes the defendant's guilt beyond a reasonable doubt. The *Fulminante* Court's categorization of errors as "trial" errors, generally subject to harmless error review, and "structural" errors, for which automatic reversal is required, presupposed a jury finding of guilt beyond a reasonable doubt. *Fulminante* did not purport to overturn the Court's repeated conclusion that automatic reversal is required when an instruction prevents the jury from finding every element of the offense beyond a reasonable doubt.

ARGUMENT

I. THIS CASE LIES AT THE INTERSECTION OF TWO FUNDAMENTAL RIGHTS GUARANTEED TO A CRIMINAL DEFENDANT.

This case involves two fundamental rights of a citizen charged with a criminal offense: the right under the Due Process Clause to be acquitted unless the prosecution proves each element of the offense beyond a reasonable doubt, and the right under the Sixth Amendment to have a jury determine whether the prosecution has met the reasonable doubt standard. When the trial court violates the first right by reducing the prosecution's burden of proof through an improper jury instruction, harmless

error review of that instruction by an appellate court violates the Sixth Amendment jury trial right.

A. Proof Beyond a Reasonable Doubt.

Almost a quarter-century ago, this Court "explicitly h[e]ld that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The Court declared that the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363; *see, e.g.*, *Jackson* v. *Virginia*, 443 U.S. 307, 315 (1979) (same). It continued:

> "There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt."

In re Winship, 397 U.S. at 364 (quoting *Speiser* v. *Randall*, 357 U.S. 513, 525-26 (1958) (ellipsis added by *Winship* Court)).

In his concurrence in *Winship*, Justice Harlan similarly stressed the crucial role of the reasonable doubt standard in ensuring that innocent defendants are not erroneously convicted. *See id.* at 370-72 (Harlan, J., concurring). He declared that the reasonable doubt standard reflects society's judgment that "it is far worse to convict an innocent man than to let a guilty man go free." *Id.* at 372.

Two terms ago, this Court unanimously reaffirmed the central importance of the reasonable doubt standard. *Cage* v. *Louisiana*, 111 S. Ct. 328 (1990) (per curiam). Recognizing that the "reasonable doubt standard 'plays a vital role in the American scheme of criminal procedure,'" *id.* at 329 (quoting *In re Winship*, 397 U.S. at 363), the Court reversed a conviction that rested on an instruction which "allow[ed] a finding of guilt based on a degree of proof below that required by the Due Process Clause," *id.* at 330.[1] It is undisputed that the reasonable doubt instruction in this case closely resembles the charge that the Court unanimously held deficient in *Cage*. *See State* v. *Sullivan*, 596 So. 2d 177, 185 (La. 1992) ("The state concedes the charge was essentially the same as the charge found to be improper in *Cage*.").

B. Trial by Jury.

The Sixth Amendment guarantees the criminal defendant a trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI. Two years before *Winship*, the Court held that the Sixth Amendment right to a trial by jury applies to the states through the Fourteenth Amendment. *See Duncan* v. *Louisiana*, 391 U.S. 145 (1968). The Court declared that "[a] right to jury trial is granted to criminal defendants in order to prevent oppression by the Government." *Id.* at 155. It made clear that *judges* are among the government officials against whom the jury trial right protects the defendant:

> Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies *and against judges too responsive to the voice of higher authority.* The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge.*

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[1] On remand from this Court, the Louisiana Supreme Court found that harmless error analysis could be applied to the erroneous instruction and that the error was harmless. *State* v. *Cage*, 583 So. 2d 1125, 1127-29 (La.), *cert. denied*, 112 S. Ct. 211 (1991).

Id. at 156 (emphasis added); *see, e.g., id.* (jury trial guarantee reflects "a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges"); *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977) (jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction"); *Taylor* v. *Louisiana*, 419 U.S. 522, 530 (1975) (jury protects against the "perhaps overconditioned or biased response of a judge").

C. The Relationship Between the Rights.

In combination, these rights guarantee that a citizen charged with a serious offense is entitled to go free unless a *jury* finds him guilty *beyond a reasonable doubt.* A citizen who requests a trial by jury cannot be convicted by a judge, even if the judge holds the prosecution to a standard of proof more demanding than reasonable doubt. *See, e.g., United States* v. *Martin Linen Supply Co.*, 430 U.S. at 572-73. Conversely, the citizen cannot be convicted by a jury under a standard of proof less stringent than reasonable doubt, even if the evidence against him is overwhelming. *See, e.g., Cage* v. *Louisiana*, 111 S. Ct. at 329-30.

This case implicates both rights. Petitioner stands convicted by a jury under a reasonable doubt instruction that "allow[ed] a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 330. No jury has found Petitioner guilty under the standard that due process requires. As the following Parts demonstrate, the Sixth Amendment jury trial guarantee bars *judges* from making the finding that the *jury* did not make.

II. THE COURT HAS REPEATEDLY DECLARED, BOTH BEFORE AND AFTER *CHAPMAN*, THAT FAILURE TO GIVE A REASONABLE DOUBT INSTRUCTION IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

This Court has never applied harmless error analysis to an instruction that reduced the prosecution's burden

of proof below the reasonable doubt standard. Indeed, both before and after *Chapman* v. *California*, 386 U.S. 18 (1967), the Court has declared repeatedly—although it has never held—that failure to instruct the jury on the necessity of proof beyond a reasonable doubt mandates automatic reversal because harmless error analysis would substitute judicial factfinding for findings by the jury. Neither the Court nor any individual Justice has as much as hinted to the contrary. Although these cases address a failure to instruct on reasonable doubt, there is no difference of constitutional significance between the *omission* of a reasonable doubt instruction and an *erroneous* instruction such as the one in this case.

This Court first addressed harmless error review of an omitted reasonable doubt instruction almost a half-century ago. In a case involving the trial court's refusal to give a key instruction concerning the scope of criminal liability under the Sherman Act as limited by the Norris-LaGuardia Act, the Court declared: "To repeat, guilt is determined by the jury, not the court. The problem is not materially different from one where the evidence against an accused charged with a crime is well-nigh conclusive and the court fails to give a reasonable-doubt instruction. *It could not be said that the failure was harmless error.*" *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. 395, 410 (1947) (emphasis added).[2]

The Court decided *Chapman* in 1967, holding for the first time that some constitutional errors were subject to harmless error analysis. *Chapman*, 386 U.S. at 22. Twelve years after *Chapman*, the Court declared:

> Our cases have indicated that *failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error.* See *Cool* v. *United States*, 409 U.S. 100. Cf. *Taylor* v. *Ken-*

[2] In dissent, Justice Frankfurter contested the Court's construction of the Norris-LaGuardia Act, but he did not dispute that the absence of a reasonable doubt instruction could never be harmless. *See* 330 U.S. at 413-22 (Frankfurter, J., dissenting).

> *tucky*, 436 U.S. 478. Thus, a defendant whose guilt was actually proved by overwhelming evidence would be denied due process if the jury was instructed that he could be found guilty on a mere preponderance of the evidence.

Jackson v. *Virginia*, 443 U.S. at 320 n.14 (emphasis added). Justice Stevens' concurrence, joined by Chief Justice Burger and Justice Rehnquist, did not take issue with the Court's observation concerning the reasonable doubt instruction.

In *Connecticut* v. *Johnson*, 460 U.S. 73 (1983), eight members of the Court made clear that failure to instruct on reasonable doubt mandates automatic reversal. The plurality of four Justices (Blackmun, Brennan, White & Marshall, JJ.) found that a conclusive presumption on the issue of intent was not subject to harmless error analysis. *See id.* at 84-88. Although the plurality did not expressly address whether a failure to instruct on reasonable doubt can be harmless, it follows *a fortiori* from its analysis that the absence of a reasonable doubt instruction mandates reversal.[3]

The four-Justice dissent in *Johnson* (Powell, J., joined by Burger, C.J., and Rehnquist & O'Connor, JJ.) took a broader view of harmless error than the plurality, but it made clear at two points that a failure to instruct on reasonable doubt cannot be harmless. The dissent noted that

> [b]ecause a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue. See *Jackson* v. *Virginia*, 443 U.S. 307, 320, n.14 (1979) ("failure to instruct a jury on the necessity of proof of guilt

[3] Justice Stevens provided the fifth vote for affirmance on the ground that the state court had an adequate state-law basis for declining to apply harmless error analysis. *Connecticut* v. *Johnson*, 460 U.S. at 88-90 (Stevens, J., concurring in judgment). Justice Stevens did not address the reasonable doubt issue.

> beyond a reasonable doubt can never be harmless error") . . . .

Id. at 95 n.3. The dissent reiterated the point: "A *Sandstrom* [burden-shifting presumption] error . . . is not comparable to an instruction that can never be harmless—for example, *an instruction that fails to inform the jury that it must find guilt beyond a reasonable doubt.*" *Id.* at 98 n.6 (emphasis added).

Three years later, the Court adopted the harmless error analysis of the *Johnson* dissent for burden-shifting presumptions. Again the Court distinguished such presumptions from instructions that " 'prevent a jury from considering an issue,' " and again it cited footnote 14 from *Jackson*, noting with apparent approval that that decision had "suggest[ed] that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless." *Rose* v. *Clark*, 478 U.S. 570, 580 n.8 (1986) (quoting *Connecticut* v. *Johnson*, 460 U.S. at 95 n.3 (Powell, J., dissenting)). Neither Justice Stevens' concurrence nor Justice Blackmun's dissent (joined by Justices Brennan and Marshall), which set forth a narrower view of harmless error analysis than the majority, took issue with the majority's position—implicit in its reference to footnote 14 of *Jackson*—that a failure to instruct on the reasonable doubt standard cannot be harmless.

Most recently, in *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), the dissent declared that the Court had "f[ound] it impossible to analyze in terms of harmless error the failure to instruct a jury on the reasonable doubt standard." *Id.* at 1255 (White, J., joined by Marshall, Blackmun & Stevens, JJ., dissenting) (citing *Jackson* v. *Virginia*, 443 U.S. at 320 n.14). The *Fulminante* majority did not address the applicability of harmless error review to a failure to instruct on reasonable doubt. *See id.* at 1263-66.

As this examination of the cases demonstrates, both before and after *Chapman* the Court has recognized repeatedly and without demur that a failure to instruct

the jury on reasonable doubt mandates automatic reversal. Any harmless error analysis would substitute factfinding by judges for factfinding by the jury—something the Sixth Amendment does not permit.

Although the cases address a *failure* to instruct on reasonable doubt, they apply equally—and perhaps with even greater force—to an *erroneous* reasonable doubt instruction such as the one in this case. In neither circumstance is the jury required to hold the prosecution to its constitutionally mandated burden of proof, and in neither circumstance can an appellate court be confident that the jury has found any element of the offense proven beyond a reasonable doubt. Harmless error analysis of either error would require factfinding by the appellate court in violation of the defendant's right to trial by jury.

Moreover, an erroneous reasonable doubt instruction may well be more damaging than an omitted instruction. This Court has recognized that "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson* v. *Kibbe*, 431 U.S. 145, 155 (1977). That is plainly the case here. A jury instructed that the prosecution has the burden of proof but not told the extent of the burden could choose any standard from a preponderance of the evidence to absolute certainty. The jury might select a standard *less* favorable to the defendant than reasonable doubt (preponderance of the evidence), or it might select a *more* favorable standard (absolute certainty). By contrast, a jury receiving the instruction in this case (and presumably following it [4]) would certainly apply a standard less

[4] *See Yates* v. *Evatt*, 111 S. Ct. 1884, 1893 (1991). The empirical research suggests that differing definitions of reasonable doubt can have a powerful impact on the jury's verdict. A study conducted with college students as mock jurors deliberating over a simulation of an actual rape trial found that 9 of 38 juries convicted under a stringent reasonable doubt instruction, while 19 of 38 juries convicted under a more lax instruction containing some of the deficiencies present in the instruction given in this case. *See* Norbert L. Kerr, *et al.*, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. Personality & Soc. Psych. 282, 287, 291 (1976).

favorable to the defendant than reasonable doubt and therefore "below that required by the Due Process Clause." *Cage* v. *Louisiana*, 111 S. Ct. at 330. Accordingly, if *failure* to instruct on reasonable doubt mandates automatic reversal, as the Court has repeatedly declared, then an *erroneous* instruction must also require reversal without harmless error analysis.

This conclusion follows as well from the Court's citation of *Cool* v. *United States*, 409 U.S. 100 (1972) (per curiam), in footnote 14 of *Jackson*. *See Jackson* v. *Virginia*, 443 U.S. at 320 n.14. In *Cool*, decided five years after *Chapman*, the trial court had "repeatedly emphasized to the jury that the Government was obligated to prove guilt beyond a reasonable doubt," 409 U.S. at 106 (Rehnquist, J., dissenting), but the court also instructed the jury that it could credit exculpatory testimony by the defendant's alleged accomplice "'[i]f the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*,'" *id.* at 102 (opinion of the Court) (quoting trial court's instruction) (emphasis added by the Court).

Without applying harmless error analysis, the Court reversed the conviction under *Winship* because the accomplice instruction "reduced the level of proof necessary for the Government to carry its burden." *Id.* at 104. *Jackson*'s citation to *Cool* for the proposition that "failure to instruct a jury on the necessity of proof of guilt beyond a reasonable doubt can never be harmless error," 443 U.S. at 320 n.14, confirms that that principle applies to instructions that *reduce* the prosecution's burden of proof, as the instruction in this case did, just as it does to a complete failure to instruct on the reasonable doubt standard.

III. THIS COURT'S DIRECTED VERDICT AND BURDEN-SHIFTING PRESUMPTION CASES DEMONSTRATE THAT THE RIGHT TO TRIAL BY JURY BARS HARMLESS ERROR ANALYSIS OF AN ERRONEOUS REASONABLE DOUBT INSTRUCTION.

Apart from the Court's outright declarations that failure to give a reasonable doubt instruction requires automatic reversal, a comparison of cases holding (1) that automatic reversal is required when the trial court directs a verdict for the prosecution, and (2) that harmless error analysis is permissible when the trial court instructs the jury to apply a burden-shifting presumption, provides further support for that principle. These cases have held that when the jury finds every element of the offense beyond a reasonable doubt, some form of harmless error analysis may be appropriate for certain instructional errors. By contrast, when (as here) the jury makes no such findings, automatic reversal is required because harmless error analysis would violate the Sixth Amendment jury trial guarantee.

A. Directed Verdict.

In an unbroken series of decisions, this Court has recognized that a directed verdict in favor of the prosecution requires automatic reversal, no matter how overwhelming the evidence. *See, e.g., Carella* v. *California*, 491 U.S. 263, 266 (1989) (per curiam); *id.* at 268-69 (Scalia, J., concurring in judgment); *Rose* v. *Clark*, 478 U.S. at 578; *id.* at 593-94 (Blackmun, J., dissenting); *Connecticut* v. *Johnson*, 460 U.S. at 83-84 (plurality op.); *id.* at 95-96 (Powell, J., dissenting); *United States* v. *Martin Linen Supply Co.*, 430 U.S. at 572-73; *United Brotherhood of Carpenters and Joiners* v. *United States*, 330 U.S. at 408-09; *Sparf & Hansen* v. *United States*, 156 U.S. 51, 105 (1895). No Justice has disputed that a directed verdict for the prosecution would require automatic reversal.

This principle rests squarely on the defendant's Sixth Amendment right to trial by jury. A citizen charged

with a crime is entitled not to be convicted except upon a finding *by a jury* that the prosecution has proven its case beyond a reasonable doubt. "'[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'" *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment) (quoting *Bollenbach* v. *United States*, 326 U.S. 607, 614 (1946)). A trial court's error in directing a verdict against the defendant "would not be cured by an appellate court's determination that the record evidence *unmistakably* established guilt, for that would represent a finding of fact by judges, not by a jury." *Id.* As the Court explained in *Rose* v. *Clark*,

> We have stated that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977) (citations omitted). Accord, *Carpenters* v. *United States*, 330 U.S. 395, 408 (1947). This rule stems from the Sixth Amendment's clear command to afford jury trials in serious criminal cases. See *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). Where that right is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

478 U.S. at 578 (ellipsis added by *Rose* Court). In short, application of harmless error analysis to a directed verdict for the prosecution would violate a defendant's Sixth Amendment right to a trial by jury.

B. Burden-Shifting Presumptions.

By contrast to cases in which the trial court has directed a verdict against the defendant, the Court has held that an instruction containing an improper burden-shifting presumption is subject to harmless error analysis. *See, e.g., Yates* v. *Evatt*, 111 S. Ct. at 1892-95;

Carella v. *California*, 491 U.S. at 266-67; *Rose* v. *Clark*, 478 U.S. at 579-82. The Court expressly rejected the contention that such analysis violated the defendant's right to trial by jury. *See id.* at 582 n.11.

The *Rose* Court's manner of distinguishing a burden-shifting presumption from a directed verdict bears squarely on the question presented here. The Court concluded that applying harmless error analysis to an improper presumption does not invade the jury's role because the jury still must find every element of the offense beyond a reasonable doubt:

> Nor is *Sandstrom* [burden-shifting] error equivalent to a directed verdict for the State. When a jury is instructed to presume malice from predicate facts, it still must find the existence of those facts beyond a reasonable doubt. . . . In many cases, the predicate facts conclusively establish intent, so that no rational jury could find that the defendant committed the relevant criminal act but did not *intend* to cause injury. . . . In that event the erroneous instruction is simply superfluous: the jury has found, in *Winship*'s words, "every fact necessary" to establish every element of the offense beyond a reasonable doubt.

Id. at 580-81 (emphasis in original; footnote omitted). In a footnote following the first sentence quoted above, *Rose* made clear that a failure to instruct on reasonable doubt (unlike a presumption) *is* "equivalent to a directed verdict for the State" and therefore cannot be harmless:

> "Because a presumption does not remove the issue of intent from the jury's consideration, it is distinguishable from other instructional errors that prevent a jury from considering an issue." *Connecticut* v. *Johnson*, 460 U.S., at 95, n.3 (Powell, J., dissenting). Cf. *Jackson* v. *Virginia*, 443 U.S. 307, 320, n.14 (1979) (suggesting that failure to instruct a jury as to the reasonable-doubt standard cannot be harmless).

Id. at 580 n.8.

Pope v. *Illinois*, 481 U.S. 497 (1987), involving a misinstruction on an element of the offense, draws the same distinction as *Rose*. In *Pope*, an obscenity prosecution, the trial court erroneously instructed the jury to determine the "value" prong of the three-part obscenity test in *Miller* v. *California*, 413 U.S. 15 (1973), according to community standards, rather than according to a "reasonable person" standard. *Pope* v. *Illinois*, 481 U.S. at 499-501. In dissent, Justice Stevens contended that application of harmless error analysis to this instruction would violate the defendants' Sixth Amendment right to trial by jury. *Id.* at 509 (Stevens, J., dissenting). He declared: "The harmless-error doctrine may enable a court to remove a taint from proceedings in order to *preserve* a jury's findings, but it cannot constitutionally *supplement* those findings." *Id.* (emphasis in original).

The *Pope* majority did not dispute the principle on which Justice Stevens rested his dissent, but it disagreed with his conclusion that harmless error analysis of the trial court's misinstruction would require the appellate court to "supplement" the jury's findings. *See id.* at 502-03. The Court found the misinstruction comparable to the burden-shifting presumption in *Rose*. It noted that

> [t]he error in *Rose* did not entirely preclude the jury from considering the element of malice, [*Rose* v. *Clark*, 478 U.S.] at 580, n.8, and the fact that the jury could conceivably have had the impermissible presumption in mind when it considered the element of malice was not a reason to retry the defendant if the facts that the jury necessarily found established guilt beyond a reasonable doubt. . . . Similarly, in the present cases the jurors were not precluded from considering the question of value: they were informed that to convict they must find, among other things, that the magazines petitioners sold were utterly without redeeming social value.

Id. at 503. Thus, in *Pope*, as in *Rose* (but unlike with a directed verdict), the Court relied on the conclusion that the jury found every element of the offense beyond a reasonable doubt.

C. Erroneous Reasonable Doubt Instruction.

The directed verdict and burden-shifting presumption cases establish two basic principles. *First*, when the jury finds every element of the offense beyond a reasonable doubt, instructional errors (and other trial errors) generally are subject to some form of harmless error analysis without violating the Sixth Amendment right to trial by jury.[5] *Second*, when an instruction prevents the jury from finding every element of the offense beyond a reasonable doubt, it cannot be harmless no matter how overwhelming the evidence, because the harmless error analysis would necessarily involve factfinding by the appellate court in violation of the Sixth Amendment jury trial guarantee.

An erroneous reasonable doubt instruction—like a directed verdict for the prosecution—falls within the second of these rules. *See, e.g., Rose* v. *Clark*, 478 U.S. at 580 n.8; *Jackson* v. *Virginia*, 443 U.S. at 320 n.14; *Lanigan* v. *Maloney*, 853 F.2d 40, 49-50 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). When the jury receives a faulty reasonable doubt instruction, as the jury did in this case, it finds *no* elements of the offense beyond a reasonable doubt. There is no set of jury findings beyond a reasonable doubt against which the appellate court can measure the effect of the error. *See, e.g., State* v. *Cage*, 583 So. 2d 1125, 1131-34 (La.) (Dennis, J., dissenting), *cert. denied*, 112 S. Ct. 211 (1991); Henry A. Diamond, *Reasonable Doubt: To Define, or Not to Define*, 90 Colum. L. Rev. 1716, 1735 (1990) (student note). Any harmless error analysis would necessarily "answer a purely hypothetical question, viz., whether, if the jury *had been* instructed correctly, it *would have* found that the state proved [the elements of the offense] beyond a reasonable doubt." *Yates* v. *Evatt*, 111 S. Ct.

[5] The precise nature of the harmless error analysis—like the availability of harmless error analysis in the first place—must be guided by the constitutional mandate that the facts be found by the jury, and not by judges. *See, e.g., Yates* v. *Evatt*, 111 S. Ct. at 1898 (Scalia, J., concurring).

at 1898 (Scalia, J., concurring) (emphasis in original). But "[w]hile such a hypothetical inquiry ensures that the State has, in fact, proved [the elements of the offense] beyond a reasonable doubt, it does not ensure that it has proved [those] element[s] beyond a reasonable doubt *to the satisfaction of a jury*." *Id.* (emphasis in original).

It bears repeating that the Sixth Amendment jury trial guarantee "reflect[s] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan* v. *Louisiana*, 391 U.S. at 156. That protection against *judges* means little if harmless error analysis can occur in the absence of a jury verdict based on findings beyond a reasonable doubt. When appellate judges speculate about what the jury *would* have done *if* it had been directed to apply the reasonable doubt standard, that "represent[s] a finding of fact by judges, not by a jury." *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment). The Sixth Amendment prohibits judges from thus usurping the jury's role.

IV. *FULMINANTE* DID NOT DISPLACE THE PRINCIPLES SET FORTH ABOVE.

The court below ignored both the cases and the principles set forth above. It never mentioned the Sixth Amendment or the right to trial by jury. Relying solely upon its earlier decision in *Cage*, which in turn rested upon the distinction drawn in *Fulminante* between "trial" errors and "structural" errors, the court held that the erroneous reasonable doubt instruction in Petitioner's trial is subject to harmless error analysis. *State* v. *Sullivan*, 596 So. 2d at 185.

The Louisiana Supreme Court misread *Fulminante*. The issue there was whether the introduction of a coerced confession mandates automatic reversal. *See* 111 S. Ct. at 1263-66. Unlike this case, the jury in *Fulminante* had found the defendant guilty beyond a reasonable doubt. Because the jury had reached a verdict beyond a reason-

able doubt on every element of the offense, the harmless error analysis did not *itself* present a Sixth Amendment jury trial issue, as it does here. *See Rose* v. *Clark*, 478 U.S. at 582 n.11. The Court did not address—and had no occasion to address—the Sixth Amendment issue that arises when an appellate court applies harmless error analysis in the absence of a jury verdict of guilt beyond a reasonable doubt. The Court therefore did not purport to call into question its repeated declarations that the failure to instruct on reasonable doubt, like a directed verdict for the prosecution, mandates automatic reversal.[6]

Having no need to consider whether the harmless error review itself presented a Sixth Amendment issue, the *Fulminante* Court went directly to the issue before it: whether introduction of a coerced confession at trial is an error for which automatic reversal is required. In its analysis of this question, the Court grouped constitutional errors into two broad categories: "trial errors," for which harmless error analysis generally is appropriate, and "structural defects in the constitution of the trial mechanism," which require automatic reversal. 111 S. Ct. at 1264-65.

The *Fulminante* Court identified certain characteristics of errors classified as "structural" and therefore not subject to harmless error review. For example, if the

[6] The *Fulminante* Court listed 18 previous cases in which the Court had applied harmless error analysis to constitutional errors. *See* 111 S. Ct. at 1263. In every case, the jury had found the defendant guilty beyond a reasonable doubt. Under the *Rose* analysis, the harmless error review in those cases did not *itself* violate the Sixth Amendment jury trial guarantee, because the appellate judges were not called upon to determine in the first instance whether the prosecution had proved each element beyond a reasonable doubt. Instead, the inquiry—permissible under the Sixth Amendment, according to *Rose*—was "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Yates* v. *Evatt*, 111 S. Ct. at 1892 (quoting *Chapman* v. *California*, 386 U.S. at 24); *cf.* Lee E. Teitelbaum, *et al.*, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147, 1176-92 (discussing the difficulties of harmless error analysis).

impact of an error cannot be "quantitatively assessed," automatic reversal is required. *Id.* at 1264; *cf. Holloway* v. *Arkansas*, 435 U.S. 475, 490-91 (1978). Similarly, an error that affects "[t]he entire conduct of the trial from beginning to end" is "structural" and cannot be harmless. *Arizona* v. *Fulminante*, 111 S. Ct. at 1265. An error that "transcends the criminal process" requires automatic reversal, as do errors that "affect[] the framework within which the trial proceeds" and those that deprive the defendant of protections without which "'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" *Id.* (quoting *Rose* v. *Clark*, 478 U.S. at 577-78).

Under the *Fulminante* Court's taxonomy of errors, an erroneous reasonable doubt instruction plainly is "structural" and therefore requires automatic reversal. The impact of the error cannot be "quantitatively assessed." *See, e.g., State* v. *Cage*, 583 So. 2d at 1135 (Dennis, J., dissenting); *State* v. *Williams*, 828 P.2d 1006, 1031 (Or.) (Unis, J., dissenting), *cert. denied*, 61 U.S.L.W. 3260 (1992). The error affects "[t]he entire conduct of the trial from beginning to end." *See, e.g., State* v. *Cage*, 583 So. 2d at 1135 (Dennis, J., dissenting). And the error "transcends the criminal process," "affect[s] the framework within which the trial proceeds," and deprives the defendant of a protection without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *See, e.g., id.; Perez* v. *Irwin*, 963 F.2d 499, 503 (2d Cir. 1992); *State* v. *Williams*, 828 P.2d at 1031 (Unis, J., dissenting).

But these are *secondary* reasons for requiring automatic reversal when the trial court reduces the prosecution's burden of proof. The principal difficulty with harmless error analysis for an erroneous reasonable doubt instruction (as for a directed verdict for the prosecution) "'is that the wrong entity judge[s] the defend-

ant guilty.'" *Carella* v. *California*, 491 U.S. at 269 (Scalia, J., concurring in judgment) (quoting *Rose* v. *Clark*, 478 U.S. at 578). The harmless error review *itself* violates the defendant's Sixth Amendment right to a trial by jury. For that reason, no matter how overwhelming the evidence in the record, reversal is required when a trial court's instruction "allow[s] a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Cage* v. *Louisiana*, 111 S. Ct. at 330.

CONCLUSION

The Sixth Amendment guarantees to a criminal defendant the right to have a *jury* determine whether the prosecution has proven him guilty beyond a reasonable doubt. When an appellate court conducts harmless error review of an erroneous reasonable doubt instruction, as the Louisiana Supreme Court did here, it usurps the jury's role and violates the jury trial guarantee. The judgment below should be reversed, and the case should be remanded for a new trial.

Respectfully submitted,

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